

## 8. BUY AMERICA

### BASIC REQUIREMENT

Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA funded projects are produced in the United States. Grantees must conduct pre-award and post-delivery audits of purchases of revenue rolling stock in order to verify that Buy America provisions, Federal Motor Vehicle Safety Standards, and purchaser's requirements are met.

### AREAS TO BE EXAMINED

1. *Buy America Provisions and Certifications*
2. *Pre-Award and Post-Delivery Audits of Revenue Rolling Stock*

### REFERENCES

1. [49 CFR Part 661](#), "Buy America Requirements"
2. [49 CFR Part 663](#), "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases"
3. [FTA "Dear Colleague" Letter, March 18, 1997](#)
4. [Federal Register Vol. 71, No. 54, pp. 14112-14118](#), Buy America Requirements; Amendments to Definitions

5. [Federal Register Vol. 72, No. 182, pp. 53688-53698](#), Buy America Requirements; End Product Analysis and Waiver Procedures, Final Rule
6. [Federal Register Vol. 72, No. 188, pp. 55103-55104](#), Buy America Requirements; End Product Analysis and Waiver Procedures, Final Rule correction

### USEFUL WEB LINKS

[FTA Buy America Home Page](#)

[Best Practices Procurement Manual](#)

[Conducting Pre-Award and Post-Delivery Audits for Bus Procurements](#), FTA T-90-7713-93-1, Rev. B

[Conducting Pre-Award and Post-Delivery Audits for Rail Vehicle Procurements](#), FTA DC-90-7713-94-1, Rev. B

[FTA Third Party Contracting FAQs](#)

### COMPLIANCE

If a grantee fails to comply with FTA Buy America requirements, FTA may decide to not participate in the procurement.

# QUESTIONS FOR THE REVIEW

1. *Has the grantee included a Buy America provision in all procurements of steel, iron, and manufactured products, except for products with a waiver or purchases under the simplified acquisition threshold (currently \$100,000)? Has the grantee obtained Buy America certifications from successful vendors?*

## EXPLANATION

Buy America regulations require that all procurements of steel, iron, and manufactured products, except for those subject to a waiver, contain Buy America provisions. Waivers are listed in Appendix A to 49 CFR 661.7 and include microcomputer equipment and software and purchases under the simplified acquisition threshold (currently \$100,000). The small purchase limitation is based on the value of the procurement, not the price of the item. For example, a purchase of four vans that totals \$120,000, even though each van costs \$30,000, must comply with the Buy America requirements. Grantees may not split procurements that exceed the threshold in order to avoid Buy America requirements. For construction projects and projects involving the installation of manufactured products, the small purchase limitation is based on the total value of the project, not the value of the steel, iron, and manufactured products purchased for the project.

On June 11, 2010, FTA issued a general waiver for final assembly in the United States for all minivans and minivan chassis, regardless of manufacturer. Purchases of minivans over the simplified acquisition threshold must still comply with Buy America domestic content requirements. The general waiver for final assembly in the United States of 15-passenger vans and 15-passenger wagons produced by Chrysler Corporation was repealed by SAFETEA-LU.

Buy America provisions apply to:

- All purchases of steel, iron, and manufactured products exceeding the simplified acquisition threshold, regardless of whether they involve capital, operating, or planning funds
- Subcontractors, regardless of the size of the subcontract, if the prime contract is more than the simplified acquisition threshold
- Purchases made using an intergovernmental agreement and jointly purchased manufactured products
- Purchases of used items

The grantee must include a clause citing the Buy America requirement and a Buy America certification in its invitations for bids (IFB) and requests for proposals (RFP). There are different certifications for procurements of rolling stock than for procurements of other steel, iron, or manufactured products. The specific text for steel, iron, or manufactured products can be found at 49 CFR 661.6. The specific text for rolling stock can be found at 49 CFR 661.12. Each is contained in the FTA *Best Practices Procurement Manual*.

The grantee, and those procuring on its behalf, must obtain a signed certification from each successful bidder providing steel, iron, or manufactured products when the total purchase price exceeds the simplified acquisition threshold. The contractor is required to certify that the materials provided either comply or do not comply with Buy America requirements. The grantee is required to retain these certifications in the contract file and make them available for inspection upon request. If a bidder or offeror certifies that it does not comply with the Buy America requirements, then the grantee must request, receive, and retain a waiver from FTA before it may award a contract to that bidder or offeror.

Grantees may not obtain signed Buy America certifications after contract award for its own contracts or contracts of other grantees to make the contracts eligible for Federal funding. Grantees may, however, obtain signed Buy America certifications before buying off state GSA-type contracts to make them eligible for Federal funding. The grantee should consider the amount of its purchase, not the contract amount of the whole state GSA-type contract, when determining whether Buy America requirements apply to those purchases.

## REFERENCE

[49 CFR 661.6](#)  
[49 CFR 661.7](#)  
[49 CFR 661.12](#)  
[49 CFR 661.13](#)  
[Federal Register Vol. 71, No. 54, pp. 14112-14118](#)  
[Notice of Buy America Waiver for Minivans and Minivan Chassis](#)  
[Best Practices Procurement Manual](#)  
[FTA Third Party Contracting FAQs](#)

## SOURCES OF INFORMATION

During the desk review, the reviewer will ask if the grantee applied for any waivers from Buy America requirements. The reviewer will examine the grantee's written procurement procedures. On site, the reviewer will discuss the procedures for incorporating Buy America provisions in procurements and obtaining

certifications from vendors. The reviewer will select a sample of procurements and review the files for evidence that Buy America requirements have been met. The reviewer will focus on procurements of vehicles and other procurements of steel, iron, or manufactured products greater than the simplified acquisition threshold. The reviewer will examine invitations for bids to determine if Buy America provisions were included. The reviewer will examine bid responses and executed contracts to determine if properly executed Buy America certifications were obtained.

## **DETERMINATION**

The grantee is deficient if it did not include Buy America provisions in solicitations or obtain signed Buy America certifications from vendors.

## **SUGGESTED CORRECTIVE ACTION**

The grantee will be directed to submit to the FTA regional office revised procurement procedures that require the grantee to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver.

For procurements for which a Buy America certification was not obtained, the grantee will be directed to provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress but not yet awarded, the grantee will be directed to submit to the FTA regional office documentation that it obtained signed Buy America certifications.

The grantee will be directed to submit to the regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

2. *Did the grantee conduct pre-award and post-delivery audits for its purchases of revenue rolling stock? What process was used to verify domestic content, final assembly activities, and location of final assembly at the pre-award and post-delivery stages? Does the grantee have on file signed pre-award and post-delivery Buy America, purchaser's requirement, and Federal Motor Vehicle Safety Standards (FMVSS) certifications?*

## **EXPLANATION**

A grantee purchasing revenue service rolling stock with Federal funds must conduct or order to be conducted pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, and FMVSS. The grantee is required to keep records, including pre-award and post-delivery certifications, which show that the regulations have been followed. The requirement applies to purchases of new and used revenue service rolling stock. (FTA recognizes that it may be impractical for used vehicles to demonstrate compliance with some of the Buy America requirements, such as the pre-award and post-delivery audit, and having a resident inspector present during the vehicle's construction.) On June 11, 2010, FTA issued a general waiver for the final assembly of minivans and minivan chassis. All other pre-award and post-delivery requirements continue to apply to minivans (domestic content, purchaser's requirements, and FMVSS.)

The pre-award audit is required before a grantee enters into a formal contract with a supplier. The post-delivery audit must be completed before a bus title is transferred to the grantee or before a bus is placed into revenue service, whichever is first. The audits require the grantee to complete two certifications at the pre-award stage and three certifications at the post-delivery stage.

If a grantee is using another grantee's procurement contract for purchasing revenue vehicles (i.e., "piggybacking"), the purchaser may rely on the pre-award audit completed prior to the original contract. However, the grantee must review the audit and prepare its own signed certifications.

## **Buy America**

If the procurement exceeds the simplified acquisition threshold, at the pre-award stage, the grantee must complete:

- A compliance certification verifying that the rolling stock will contain a minimum of 60 percent domestic products, by cost, and that final assembly will take place in the United States; or
- An exemption certification indicating that the grantee has a letter from FTA granting a waiver from the Buy America requirement.

The grantee must complete similar certifications at the post-delivery stage, based on the actual vehicles delivered.

Proper documentation for the certification includes disclosure by the manufacturer of the final assembly location; a listing of the component and subcomponent parts, the cost (actual or percent of total) of such components and subcomponents and the country of origin; a description of final assembly

activities; and the cost of final assembly. Final assembly costs are not to be included when calculating the percent domestic content of the vehicle.

The grantee or an independent third party must conduct the Buy America audits. The audit may be based on information provided by the manufacturer; however, certification by the manufacturer is not adequate.

FTA issued a waiver from Buy America requirements for purchases under the simplified acquisition threshold (currently \$100,000). Thus, a procurement of small buses and vans which totals less than \$100,000 is not subject to the general Buy America requirements of 49 CFR Part 661. This waiver does not exempt rolling stock from the pre-award and post-delivery purchaser's requirements and FMVSS audits required by 49 CFR Part 663.

### **Purchaser's Requirements**

The recipient must complete a pre-award purchaser's requirements certification verifying that the manufacturer's bid specifications comply with the grantee's solicitation requirements and that the proposed manufacturer is responsible and capable of building the bus to the solicitation specifications. The pre-award certification may be based on the grantee's determination that the vendor is responsive and responsible.

The grantee must complete a post-delivery purchaser's requirements certification verifying that the buses delivered meet the contract specifications. The post-delivery certification is based on the grantee's visual inspections and road tests and, if required, the resident inspector's monitoring of the final assembly process and final report of manufacturing activities.

The requirement to conduct an audit for compliance with purchaser's requirements and sign a certification applies to all purchases of revenue rolling stock, even those under the Federal simplified acquisition threshold.

### **FMVSS**

The grantee must complete, at the post-delivery stage, a certification that the grantee has received from the vehicle manufacturer at both the pre-award and post-delivery stages a certification that the vehicles comply with the FMVSS issued by the National Highway Traffic Safety Administration (49 CFR Part 571). The requirement to conduct an audit for compliance with FMVSS and sign a certification applies to all purchases of revenue rolling stock, even those under the Federal simplified acquisition threshold.

### **REFERENCE**

49 CFR 661.11, Appendices B and C  
49 CFR 663.21 and 663.31  
Dear Colleague letter of March 30, 2001  
Federal Register Vol. 71, No. 54, pp. 14112-14118  
49 CFR Part 571  
Notice of Buy America Waiver for Minivans and Minivan Chassis  
*Conducting Pre-Award and Post-Delivery Audits for Bus Procurements*  
*Conducting Pre-Award and Post-Delivery Audits for Rail Vehicle Procurements*  
*Buying Used Buses*

### **SOURCES OF INFORMATION**

The reviewer will examine the grantee's procurement procedures for a discussion of pre-award and post-delivery audits. On site, the reviewer will discuss the process for completing the pre-award and post-delivery audits and certifications. As part of the review of procurement files, the reviewer will examine the pre-award and post-delivery audit certifications and supporting documentation for a recent procurement of revenue rolling stock.

### **DETERMINATION**

The grantee is deficient if it did not conduct all of the required audits for revenue rolling stock procurements.

The grantee is deficient if it conducted the required pre-award and post-delivery audits and documented the procedures but did not sign all required certifications.

### **SUGGESTED CORRECTIVE ACTION**

The grantee will be directed to submit to the FTA regional office procedures for conducting pre-award and/or post-delivery audits for future revenue rolling stock procurements.

The grantee will be directed to submit documentation to the FTA regional office that the procurement complied with Buy America, FMVSS, and purchaser's requirements.

The grantee will be directed to submit to the FTA regional office pre-award audit information and certifications before awarding the contract and the post-delivery audit information and certifications before drawing FTA funds for the next revenue rolling stock procurement.

If the grantee did not sign the pre-award and/or post-delivery certifications, the grantee will be directed to submit to the FTA regional office the certifications for the procurement reviewed and procedures for completing the applicable pre-award and post-delivery audits certifications for future revenue rolling stock procurements.

The grantee will be directed to submit to the FTA regional office pre-award audit certifications before awarding the contract and post-delivery audit certifications before drawing FTA funds for the next revenue rolling stock procurement.

3. *If the grantee purchased rolling stock with multiple delivery dates using either options or multi-year procurements, did it perform and certify a pre-award audit for each group of vehicles before placing the order?*

#### **EXPLANATION**

Grantees may purchase vehicles in several groups over several years using either vehicle procurement contracts with options or multi-year vehicle procurement contracts. FTA requires that each group of vehicles purchased, i.e., each "order" of vehicles, have a pre-award audit before the order is placed. One pre-award audit may suffice, provided that there is no change in vehicle configuration, i.e., no change that is expected to have a significant impact on vehicle handling and stability or structural integrity, between successive deliveries of vehicles.

If a grantee is exercising another grantee's options for purchasing revenue vehicles (i.e., "piggybacking"), the purchaser may rely on the pre-award audit completed prior to the original contract if there is no change in vehicle configuration. However, the grantee must review the audit and prepare its own signed certifications.

#### **REFERENCE**

[49 CFR 663.21](#) and [663.31](#)  
[FTA Dear Colleague Letter, March 18, 1997](#)

#### **SOURCES OF INFORMATION**

The reviewer will examine contract files, invoices, and other procurement documentation available at the site visit to identify delivery dates and obtain information on options.

#### **DETERMINATION**

The grantee is deficient if it ordered a group of vehicles before the pre-award audit was conducted.

#### **SUGGESTED CORRECTIVE ACTION**

The grantee will be directed to provide the FTA regional office with an explanation and evidence that it has completed the required audits. The evidence must include audit documentation and work papers.

The grantee will be directed to submit to the FTA regional office procedures for conducting pre-award

audits for options and/or multi-year contracts so that future procurements will comply with this requirement.

The grantee will be directed to submit to the FTA regional office pre-award audit information and certifications before awarding the contract or exercising an option for the next revenue rolling stock procurement.

4. *Did the grantee use in-plant inspectors when required?*

#### **EXPLANATION**

Grantees are required to have an in-plant inspector throughout the manufacturing process if it meets the following criteria:

- Grantees purchasing any number of rail vehicles
- Grantees in urbanized areas with populations of more than 200,000 that purchase more than 10 buses
- Grantees in areas with populations of 200,000 or less that purchase more than 20 buses

Grantees that purchase buses for subrecipients are only required to use an in-plant inspector if 10 or more of the vehicles are purchased for a subrecipient in an urbanized area with a population of more than 200,000, or 20 or more of the vehicles are purchased for a subrecipient in an area with a population of 200,000 or less. The grantee or the subrecipient may provide the inspector.

FTA does not require in-plant inspectors for any number of unmodified vans manufactured by the automobile companies. FTA requires only a visual inspection and road test after delivery for such procurements.

One in-plant inspector can meet the requirement for multiple grantees. The inspector may not be an agent or employee of the manufacturer. The inspector must prepare a report providing accurate records of all vehicle construction activities and summarizing how the construction and operational characteristics of the vehicles met (or did not meet) the contract specifications.

Upon delivery of the vehicles and following receipt and review of the inspector's report, if applicable, the grantee must visually inspect and road test the vehicles.

#### **REFERENCE**

[49 CFR 663.37](#) (a) and (c)

#### **SOURCES OF INFORMATION**

The reviewer will examine projects in TEAM-Web for recent grants to determine the type and quantity of

vehicles procured. On site, the reviewer will discuss the vehicles procured over the last several years and the need for in-plant inspectors. If an in-plant inspector was required, the reviewer will discuss how the requirement for an in-plant inspector was fulfilled. The reviewer will ask the name of the organization providing the in-plant inspector, e.g., the grantee, the subrecipient, or third-party contractor to the grantee or subrecipient, and review procurement files.

#### **DETERMINATION**

The grantee is deficient if it did not provide for an independent in-plant inspector during manufacture of the vehicles when required or did not prepare a report documenting the construction of the vehicles and how they meet the bid specifications.

#### **SUGGESTED CORRECTIVE ACTION**

The grantee will be directed to submit to the FTA regional office procedures for providing, or requiring subrecipients to provide, in-plant inspectors during the construction of vehicles.

The grantee will be directed to submit to the FTA regional office the inspector's report before drawing FTA funds for the next procurement requiring in-plant inspectors.

5. *How does the grantee ensure that subrecipients and contractors making procurements on its behalf include Buy America provisions in applicable solicitations, obtain signed Buy America certifications from vendors for applicable procurements, and comply with pre-award and post-delivery audit requirements?*

#### **EXPLANATION**

Buy America and pre-award and post-delivery audit requirements flow through to subrecipients and

management or service contractors making FTA funded procurements on the grantee's behalf. The grantee is responsible for ensuring that subrecipients and management or service contractors comply with the requirements.

#### **REFERENCE**

[49 CFR 661.6](#)

[49 CFR 661.13](#)

[49 CFR 663](#)

[Federal Register Vol. 71, No. 54, pp. 14112-14118](#)

#### **SOURCES OF INFORMATION**

The reviewer will examine subrecipient agreements, management or service contracts, project/state management plans, and other documentation of procurement procedures for information on the Buy America and pre-award and post-delivery audit requirements and the responsibilities of the grantee, contractors, and subrecipients in the procurement process. On site, the reviewer will discuss oversight procedures. If the grantee has subrecipients' or contractors' documentation of direct procurements on file, the reviewer will examine a sample. Otherwise, the reviewer will examine procurement files during a site visit to subrecipients or contractors.

#### **DETERMINATION**

The grantee is deficient if it does not ensure compliance with the Buy America requirements.

The grantee is deficient if it does not ensure compliance with pre-award and post-delivery audit requirements.

#### **SUGGESTED CORRECTIVE ACTION**

The grantee will be directed to submit to the FTA regional office procedures for ensuring that subrecipients and management or service contractors comply with Buy America or pre-award and post-delivery audit requirements.